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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-485

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD,
a corporation, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. Workmens' Compensation Is Not Available.

On page 6 of its Brief the Respondent asserts that Petitioners are entitled to receive workmens' compensation benefits under California law, and that "Petitioners have been unable to identify any border state that prohibits the extraterritorial application of a worker's compensation scheme of recovery." The State of Michigan adopted that prohibition in 1977.[1] Its action came as a postscript to the *Cox v. Chesapeake Ohio Railroad Co.* decision referred to on page 9 of our Petition and on pages 4, 5 and 7 of Respondent's Opposing Brief. Oscar E. Cox filed a claim for workers' disability compensation in the State of Michigan after this Court denied his petition for a writ of certiorari to review

1. Petitioners discovered this information after filing their Petition.

the dismissal of his action for damages under the Federal Employers' Liability Act.

When notified of the claim the Chesapeake Ohio Railroad Co. filed an answer by special appearance and a motion to dismiss. On April 27, 1976, a hearing on the motion to dismiss was held before the Bureau of Workers' Disability Compensation for the State of Michigan.[2] The railroad argued that Cox was not entitled to disability compensation because he was engaged in interstate and foreign commerce at the time he was injured in Canada. It argued that the Federal Employers' Liability Act is the exclusive remedy available to employees engaged in interstate or foreign commerce and that employees so engaged are not within the jurisdiction of the workmens' compensation act of any state. A portion of the reporter's transcript appears in Appendix A.

On January 21, 1977, the Bureau of Workers' Disability Compensation granted the Railroad's motion and dismissed Mr. Cox's claim for disability compensation. A copy of the decision appears in Appendix B.[3]

The Railroad's argument and the Bureau's decision were based upon the opinions of this Court in *New York Central R.R. Co. v. Winfield,* 244 U.S. 147 (1917); *Erie R.R. Co. v. Winfield,* 244 U.S. 170 (1917) and *New York Central R.R. Co. v. Tonsellito,* 244 U.S. 360 (1917). Those decisions hold that the Federal Employers' Liability Act is the exclusive remedy available to railroad employees injured while engaging in interstate commerce. In the *Tonsellito* decision this Court stated:

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2. The hearing was held before the Honorable Ernest F. Hapke, Administrative Law Judge of the Bureau of Workers' Disability Compensation, at 610 Pontiac State Bank Building, 28 North Saginaw, Pontiac, Michigan.
3. An appeal from that decision may be pending.

> [T]he act 'is comprehensive and, also, exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State. (at pages 361 and 362.)

The result of the above-cited decisions is that railroad employees injured while engaging in interstate commerce are precluded from receiving state workmens' compensation benefits. They are also precluded from seeking any other form of recovery under the common or statutory law of any state. The employee is left without any remedy under state or federal law if he is not entitled to the benefits of the Federal Employers' Liability Act. It follows that the employee is required to "assume the risk" of being injured while working in a foreign country because he has no remedy under our laws. Finally, there is no incentive for a railroad to prevent extraterritorial injuries because it has no financial liability. These results present important public policy issues warranting this Court's review of the decisions below.

2. The Lauritzen v. Larsen Decision.

Respondent asserts that this Court focused on the place of the *injury* in reaching its decision in *Lauritzen v. Larsen,* 345 U.S. 571 (1953).[4] Respondent also asserts that the 1939 Amendment to the FELA did not broaden the extraterritorial scope of the Act because this Court, in *Lauritzen,* reaffirmed the *Chisholm*

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4. Respondent's brief at page 5.

ruling.[5] Petitioners respectfully suggest that the opinion of this Court in *Lauritzen* does not support either of these assertions.

Lauritzen involved an action for a maritime injury under the Jones Act, 46 U.S.C. §688. The plaintiff, a Danish seaman, was negligently injured aboard a Danish ship while in Havana harbor. The plaintiff conceded that Danish law was applicable to his action, but contended that the wording of the Jones Act was broad enough to provide an optional cumulative remedy. (At pages 576-577.)

This Court made a choice of law analysis and determined that Danish law should be applied because the parties were both Danish subjects and the events took place on a Danish ship, not within our territorial waters. (At page 592.) In reaching its decision this Court reviewed seven factors which it believed were generally conceded to influence choice of law decisions.[6] Citing *Chisholm,* this Court noted that the *place of the wrongful act* was the most commonly accepted solution to choice of law problems. (At page 583.) The place of the *injury* was never mentioned as a factor to be considered in determining the applicable law.

The Respondent rewrites and distorts the opinion of this Court by asserting that it focused on the place of the injury in reaching its decision in *Lauritzen*. This is evident from the following:

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5. *id* at pages 3 and 4.
6. The seven factors were the: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum and (7) the law of the forum.

This Court's opinion, 345 U.S. at 580-581:

In 1920, Congress, under the title "An Act To provide for the promotion and maintenance of the American merchant marine . . . ." and other subjects not relevant, provided a plan to aid our mercantile fleet and included the revised provision for injured seamen now before us for construction. 41 Stat. 988, 1007. *It did so by reference to the Federal Employers' Liability Act, which we have held not applicable to an American citizen's injury sustained in Canada while in service of an American employer. New York Central R. Co. v. Chisholm,* 268 U.S. 29. And it did not give the seaman the one really effective security for a claim against a foreign owner, a maritime lien.

Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law. (Emphasis added.)

The Respondent's revision, Brief in Opp., p. 5:

Petitioners seek to distinguish *Chisholm* on the grounds that the complaints allege acts of negligence occurring within the United States. In *Lauritzen v. Larsen,* the court focused on the place of injury by stating:

"The Federal Employers' Liability Act [is] not applicable to an *American citizen's injury sustained in Canada* while in service of an American employer. *New York Central Railroad Co. v. Chisholm,* 268 U.S. 29." (Emphasis added.)

This transparent revision and distortion reflects the Respondents consistent reluctance to accept the fact that the above reference to *Chisholm* was made in the context of reviewing the history of the Jones Act and this Court's role in the construction of broadly worded statutes. (At pages 576-582.) At page 583 of *Lauritzen*, this Court confirmed that the place of the injury was not significant in *Chisholm*. It did so by citing *Chisholm* as a case where the law of Canada, the place of the wrongful act, was held to be applicable.

There is no reference in the *Lauritzen* decision to the 1939 Amendment to the FELA. There is nothing in the opinion to indicate that this Court intended to reaffirm *Chisholm* as standing for the proposition that the FELA does not extend to extraterritorial injuries. In fact, *Lauritzen* adds resolve to Petitioners' contention that the FELA should be applicable where the parties are United States citizens and the negligence occurs within the United States.

3. The Cox v. Chesapeake Ohio Railroad Co. Decision.

Respondent asserts that the decision in *Cox v. Chesapeake Ohio Railroad Co.*, 494 F.2d 349(6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975), squarely presented the same issue as in the cases at bar.[7] It did not. In *Cox*, the sole issue presented was whether modern choice of law rules should alter the *Chisholm* decision. Although the Statement of the Facts in *Cox* suggests that the railroads negligence may have occurred within the United States, that issue was not presented for appellate review. Cox did not even mention the 1939 Amendment to the Federal Employers' Liability Act. The briefs filed by the parties contain no argument on either of these issues. The opinion rendered by the Court of Appeals For The Sixth Circuit does not indicate that it considered the 1939 Amendment to the Act or the place where the negligence occurred. Cox's petition for a writ of certiorari did not

7. Respondent's Brief at pages 4, 5 and 7.

raise either of these issues. Therefore, the issues presented here are different than in *Cox*.

4. If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would not be undermined.

On page 5 of its Brief, Respondent states:

> If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would be severely undermined in that a pleader could always allege that some act of negligence occurred within the territorial limits of the United States.

Respondent is concerned that in all cases of extraterritorial injury a plaintiff can confer jurisdiction on a District Court by merely alleging that some act of negligence occurred within the United States. Its concern is unwarranted. The allegation of negligence is subject to challenge in the same manner as the statutory $10,000.00 jurisdictional minimum in an action based upon diversity of citizenship is subject to challenge. If the defendant in a diversity action challenges the allegations of jurisdictional facts, the plaintiff must support them by competent proof and by a preponderance of the evidence. The Court will inquire into the existence of jurisdiction for the purpose of determining whether the facts support the allegations. *Nelson v. Keefer*, 451 F.2d 289, 296(3rd Cir. 1971).

The same procedure could be applied in an action under the Federal Employers' Liability Act. If the plaintiff asserts that some act of negligence occurred within the territorial limits of the United States and the defendant challenges that assertion the Court will merely conduct an inquiry to determine whether the plaintiff can support his allegation by competent proof. If not, the complaint will be dismissed. Therefore, *Chisholm* will not be undermined if read as Petitioners urge.

5. The Denial Of Benefits Constitutes Class Exclusion.

Respondent asserts that there is no class exclusion if American railroad employees whose duties carry them from the United States into foreign countries are denied the benefits of the Act.[8] Its objection relates to the definition of a class. Webster's Seventh New Collegiate Dictionary defines a class as "a group, set, or kind sharing common attributes." The aggregate group of American railroad employees whose duties carry them from the United States into foreign countries constitute a class. The common attribute is that each member of the class has duties that carry him into foreign countries. Therefore, the denial of benefits under the Act is class exclusion, a concept rejected by this Court in *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502 (1955).

8. Respondent's Brief at pages 3 and 4.

CONCLUSION

This Court has not reviewed the rights of American railroad employees injured in foreign countries since it rendered the *Chisholm* decision in 1925. That decision conflicts with more recent decisions of this Court construing the 1939 Amendment to the Federal Employers' Liability Act. *Chisholm* permits a railroad to escape financial responsibility for its negligence because its employees have no remedy under state or federal law. The District Court below recognized that the application of *Chisholm* produced the wrong result. The Courts of Appeals for the Ninth Circuit and the Sixth Circuit have indicated their unwillingness to abandon *Chisholm* without this Court's approval. Therefore, this Petition for Writs of Certiorari presents an important question of public policy affecting railroad employees in at least thirteen states. Petitioners respectfully submit that it should be granted.

Respectfully submitted,

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APPENDIX "A"

APPENDIX A

Now it is the position of the Defendants insofar as the Claim arising out of the Canadian accident near Dutton, Ontario, that this Board has no jurisdiction to entertain the Claim because at the time of the injury and accident the Plaintiff was engaged in furtherance of interstate and foreign commerce and he was employed by a railroad engaged in interstate and foreign commerce, and both were so engaged at the time of the accident, that under the law of the United States as is applied to railroad workers the Supreme Court of the United States has said, in New York Central Railroad Company versus Winfield 244 US 147, that the, 'the liability and obligation of the interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are both regulated inclusively and exclusively by the Federal Employees Liability Act, and Congress having thus fully covered the subject, no room exists for state regulations even in respect to injuries occurring without fault as to which the Federal Act provides no remedy.'

That same law has been set forth by the Supreme Court of the State of Michigan in Karey versus Grand Trunk Western Railway Company, 200 Michigan 12, where the Supreme Court stated at page 19, 'in our opinion the Winfield Cases — which I just referred to in argument, — are controlling under the Michigan Workmen's Compensation Act as under the New York Act, and that they settle conclusively for all American jurisdictions the question that employees of an interstate carrier, engaged in interstate business, are not within the jurisdiction of the state Workmen's Compensation Acts.' (at pages 4 and 5.)

APPENDIX B

APPENDIX B

(MICHIGAN DEPARTMENT OF LABOR (

BUREAU OF WORKERS' DISABILITY COMPENSATION

LANSING, MICHIGAN 48909

DECISION

Oscar E. Cox
Employee

vs.

The Chesapeake & Ohio Railway Co.
Own Risk
Employer-Insurer(s)

A hearing having been held 4-27, 19 76 at Pontiac, Michigan on petition of (plaintiff) (defendant), I find as follows:

~~That the above named employee (did) (did not) receive a personal injury arising out of and in the course of (his) (her) employment by the above named employer on~~ _____, 19____, and, as of said date of injury, said employee had an average weekly wage of $_____, in (skilled) (unskilled) labor, and had the following dependents: _____

1. **IT IS THEREFORE ORDERED** that said Defendant(s) pay compensation at the rate of $_____ per week for partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ from _____ 19____ to _____ 19____ inclusive, and partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ 19____ to _____ 19____ inclusive, and partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ 19____ to _____ 19____ inclusive, and further, that said employee is still totally/partially disabled and Defendant's shall pay compensation at the rate of $_____ until further order of the Bureau; and, that said Defendant(s) shall reimburse said employee $_____ for _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

2. **IT IS THEREFORE ORDERED** that the employee is entitled to receive from said defendant(s) compensation at the rate of $_____ per week for the specific period of _____ weeks from _____ 19____ for the loss of _____; and, that said Defendant(s) shall reimburse said employee $_____ for _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each weekly payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

3. **IT IS THEREFORE ORDERED** that said Defendant(s) shall pay compensation to said Applicant(s) at the rate of $_____ per week as (total) (partial) dependents of _____ (employee) from _____ 19____ until further order of the Bureau but not to exceed (430) (500) weeks from the date of death of said employee; and further, that said Defendant(s) shall pay $_____ as follows: _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each weekly payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

~~IT IS FURTHER ORDERED that~~ after considering arguments and briefs of the parties, defendants motion to dismiss must be and the same hereby is granted.

MAILED
FEB 17 1977
BUREAU of WORKMEN'S COMP.
LANSING, MICH.

Ernest F. Hapka
Administrative Law Judge

Signed this 21st day of January A.D. 19 77

This award (is) (is not) stipulated by the parties.
Further compensation (will) (will not) be paid voluntarily.

UNLESS A CLAIM FOR REVIEW IS FILED BY EITHER PARTY WITHIN FIFTEEN DAYS FROM THE DATE STAMPED HEREON AS "MAILING DATE", THIS DECISION SHALL STAND AS THE FINAL DECISION OF THE BUREAU OF WORKERS' DISABILITY COMPENSATION.

NO ATTORNEY FEE IN EXCESS OF 30% OF THE COMPENSATION ACCRUED IS AUTHORIZED FOR CASES WHERE THE DATE OF INJURY WAS ON OR AFTER SEPT. 1, 1965 AND 25% FOR INJURY DATE BEFORE SEPT. 1, 1965.